

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

OCTOBER 24, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0561-CR

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MARK E. BABINO,

Defendant-Respondent.

APPEAL from an order of the circuit court for Outagamie County:  
JOSEPH M. TROY, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. The State appeals an order granting Mark Babino a new trial. It argues that the trial court erroneously exercised its discretion and erred as a matter of law when it concluded that Babino was entitled to a new trial in the interest of justice under § 805.15(1), STATS., without having determined either that justice had miscarried or that the real controversy had

not been fully tried. We reject this argument and affirm the order granting a new trial.

Babino was convicted by a jury of sexually assaulting his fourteen-year-old niece. The complaint and information charged only one count of sexual assault based on the victim's testimony that Babino had sexual contact with her approximately twenty-five times over a six-month period. The State was allowed to present "other crimes" evidence consisting of other sexual contact between Babino and the victim as well as other unrelated sexual contact. The trial court concluded that Babino was entitled to a new trial because it failed to instruct the jury in such a manner that it could be assured that the jury unanimously found that a specific instance of sexual assault occurred.

Section 805.15(1), STATS., gives the trial court the authority to grant a new trial if it concludes that the verdict was returned based on an erroneous jury instruction. See *Richards v. Gruen*, 62 Wis.2d 99, 110-11, 214 N.W.2d 309, 314-15 (1974). Here, the trial court failed to instruct the jury that it must unanimously agree on the particular act that provides the basis for the conviction. See *State v. Lomagro*, 113 Wis.2d 582, 592, 335 N.W.2d 583, 589 (1983). Babino testified that sometime during October 1992, the victim grabbed his hand and placed it on her vaginal area. When he realized what had occurred, he immediately pulled his hand away. During closing argument, the State characterized that testimony as an admission that a sexual assault occurred in October or November of 1992. The victim, on the other hand, identified one incident that could be distinguished from the other incidents. She testified that one incident stood out from the rest because she was caught in a rain storm and had to run home. She was offered a ride by a police officer. Her testimony, corroborated by the officer, establishes that the rain storm incident occurred in August 1992. Because the jury heard testimony and argument regarding two specific separate incidents, it is not clear whether a unanimous jury found that either of the incidents occurred. We are unable to determine which of the events constitutes the crime for which Babino was convicted and which event was introduced as "other crimes" evidence. The trial court correctly concluded that it erroneously instructed the jury when it failed to give a special unanimity instruction.

Citing *State v. Harp*, 161 Wis.2d 773, 469 N.W.2d 210 (Ct. App. 1991), the State argues that the trial court must find that justice miscarried or

that the real controversy has not been fully tried before it can order a new trial in the interest of justice. Even if that interpretation of *Harp* is correct, it provides no basis for reversal. Although the trial court did not explicitly state that the real controversy had not been fully tried, that finding is implicit in its decision. The postconviction brief submitted by the State reminded the trial court that its authority to grant a new trial depends on either a finding that justice had miscarried and the result on retrial would likely be different or that the real controversy had not been fully tried. Because the trial court explicitly found that retrial would not likely change the verdict, it must have found that the real controversy had not been fully tried. This finding is supported by the fact that we are unable to determine whether the jury unanimously found that any specific episode of sexual contact occurred. The real controversy has not been fully tried when an error in the jury instruction causes the court to question the meaning of the verdict.

*By the Court.* – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.